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Issue Date: 11 August 2005

CASE NO.: 2004-LHC-1895

OWCP NO.: 07-168491

IN THE MATTER OF

TROY M. DUPRE,
Claimant

v.

FRANK'S CASING CREW & RENTAL,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORPATION,
Carrier

APPEARANCES:

Jeremiah A. Sprague, Esq.
On behalf of Claimant

David K. Johnson, Esq.
On behalf of Employer / Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Troy M. Dupre (Claimant) against Frank's Casing Crew and Rental (Employer) and The Louisiana Workers' Compensation Corporation (Carrier). The formal hearing was conducted in Metairie, Louisiana on April 20, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-11, and Employer/Carrier's Exhibits 1-3. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues, located at JX 1, which were submitted as follows:

1. The date of injury/accident is disputed;
2. Whether injury was in the course and scope of employment is disputed;
3. Date Employer was advised of injury is disputed;
4. A Notice of Controversion was filed on October 29, 2003;
5. An Informal Conference was held on April 29, 2004;
6. Average weekly wage at the time of injury was $900.00;
7. Nature and extent of disability:
    (a) Temporary total disability is disputed;
    (b) Benefits have not been paid;
    (c) Medical benefits have not been paid;
8. Permanent disability is not applicable;
9. Date of maximum medical improvement is not applicable.

[1] The parties were granted time post hearing to file briefs, which both parties did. This time was extended up to and through July 18, 2005.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, p.__"; and Claimant's Exhibit- "CX __, p.__".

Issues

The unresolved issues in this proceeding are:

1. Causation of alleged injuries;
2. Entitlement to benefits, if any; and
3. Ability to return to gainful employment.

Statement of the Evidence

Testimony of Troy M. Dupre

Claimant is thirty-nine years old and lives in Houma, Louisiana. He began working for Employer in 1993, and did so for five and a half to six years before leaving to pursue other employment, but returned to work for Employer on January 13, 2003. Tr. 11. Claimant was employed as a tong operator; his main duty was pipedriving in the construction of oil wells. He worked mostly in a four-man "casing crew." On September 15, 2003, the day of Claimant's alleged accident, the casing crew consisted of Claimant, Russell Every, Clark Dupre, and Raymond Scott. Tr. 12. Claimant explained that a tong is part of a hydraulic tong system that tightens pipe when putting pieces of pipe together. Claimant's other tasks included pulling slips, which involves the removal of pipe casings. He said he carried several heavy items including pick-up lines weighing fifty to sixty pounds, tool boxes that weighed twenty-five to thirty pounds, and stands to hold the tongs, which weighed forty to fifty pounds. Tr. 14.

On September 15, 2003, Claimant and the casing crew were working on the High Island rig, approximately forty to fifty miles offshore. The crew's job was to "screw and drive pipe"; the job lasted four or five days. Claimant testified that he was pulling slips and his back "started tightening up," and he "just started having lower back pains." Tr. 16. Claimant said Raymond Scott was on the rig floor; the other two crew members were sleeping. Claimant said he told his supervisor, Russell Every, that his lower back hurt and he was having trouble sitting down. He recalled Mr. Every told him he probably pulled a muscle, which Claimant agreed with. He said Mr. Every told him to try not to lift anything and to "take it easy." Tr. 17.

Claimant said he was familiar with the procedure for reporting on the job injuries, and recalled signs posted offshore directing employees to report to an immediate supervisor or the company man in charge. Claimant said he believed

that he complied with the procedure when he told Mr. Every of his back pain. Tr. 18.

The job concluded and Claimant returned home where he "took it easy a day" and the next day noticed his pain becoming worse, especially that it was hard to sit down and get up. Mr. Every telephoned Claimant and informed him there was a job that day, but Claimant told Mr. Every that he had a doctor's appointment. Mr. Every told Claimant to contact the dispatcher; Claimant did and said he spoke to "David." Claimant told David that he pulled a muscle when he was pulling slips offshore. David told Claimant to let him know what the doctor said. Tr. 20.

Claimant recalled that Dr. Robichaux of the Family Doctor Clinic diagnosed Claimant's condition as a strained back. He said that Mr. Every came to his house a couple of days later, and Claimant told him of the diagnosis and that he was to return to the doctor in a week if he was not better. Claimant said he told Mr. Every that an accident report needed to be completed, and Mr. Every said he would obtain one. Tr. 21.

Claimant said he had another doctor's appointment where x-rays were performed and Claimant was told he had slippage in his L4 and L5 discs. Claimant said he contacted Mr. Every again about completing an accident report, and a week later, Mr. Every told Claimant that Brooks Blakeman, the manager in Houma, would not give Mr. Every an accident report. Tr. 21. Claimant said he attempted to contact Mr. Blakeman, but Mr. Blakeman did not return Claimant's phone calls.

Claimant testified that he told Dr. Robichaux that he did some heavy lifting offshore and pulled something in his back. He said Dr. Robichaux asked if anything else happened, and Claimant said he went in the backyard where his brothers were cutting grass, but Claimant did not do anything at his house.[3] Claimant said that Dr. Harris gave him a shot, performed x-rays, and ordered six physical therapy sessions. Claimant said he told the physical therapist that he injured his back by performing heavy lifting offshore. Tr. 24.

[3] Claimant testified: "When I had seen Dr. Robichaux, he had asked me what happened. I told him I did some heavy lifting offshore and I had pulled something in my back. He said, "Well, that's all you did?" I said, "I went in back my house with my brothers. They was cutting grass back there; they was making food plots." And he said, "Well, what do you think; you just strained your back?" I said, "Yeah, I didn't do nothing at my house. Maybe I aggravated it or something, you know." Tr. 22-23.

Claimant was subsequently referred to Dr. Haydel, an orthopedist. He recalled that he told Dr. Haydel at the first appointment that he hurt his back when he was pulling slips offshore. Tr. 24. Dr. Haydel ordered an MRI, which Claimant said revealed herniated L4 and L5 discs. He said Dr. Haydel recommended injections and physical therapy, and surgery if neither of those options were successful. Tr. 25. Claimant said he did not have previous back problems. He identified a form located at Claimant's Exhibit 2, p. 12 as the initial questionnaire he completed at Dr. Haydel's office.

Following his injury, Claimant has not returned to work of any kind. He did not feel he was physically capable of performing his previous employment, because he believed it involved too much lifting. He explained that some days he feels good, and others, he can barely get out of bed. He wants to have surgery. He said he takes pain medication prescribed by Dr. Haydel, including Vicodin and Flexeril. Tr. 29. He takes the Vicodin as needed, and takes Flexeril almost every day. Tr. 30. He sees Dr. Haydel "every so often" and has been paying $75.00 at each visit. The only income Claimant has received since his injury is from cashing out part of his 401(k).

On cross-examination, Claimant clarified that when he was pulling slips, "about three joints from the end" was when he began to feel tightness in his back. Tr. 31. He said he told Mr. Scott that his back hurt at that time. He explained that he was in a room with Mr. Scott, Mr. Every, and Mr. Dupre when he said his back hurt, and maintained that he said he hurt it on the job while pulling slips. Tr. 32. Claimant could not explain why none of his three co-workers testified in their depositions that they heard Claimant say he hurt his back on the job. Tr. 33.

Claimant said he told all three co-workers while the job was still in progress; they had finished the work but still had to "rig down." Tr. 34. He agreed that he was home before 9:00 a.m. on September 16, 2003, and that the first time he saw Dr. Robichaux was September 20. He explained that he waited one day, and then got the first available appointment, which was September 20. Tr. 35. Claimant was asked about a form from Dr. Harris' records, which indicates Claimant's first visit was September 20, but also indicates that his injury was not caused by an accident. Tr. 35; EX 1. Claimant reiterated that he told Dr. Harris that he injured his back while working offshore. Tr. 36.

Claimant said that Dr. Harris sent him to physical therapy, but Claimant wanted to see an orthopedist, so he picked Dr. Haydel and made the appointment. Tr. 35-36. Claimant believed he followed proper procedure by reporting his injury

to Mr. Every. Claimant said an accident report was eventually completed, when he and Mr. Blakeman sat down and went through the form together. Tr. 39. Claimant was shown a form located at Employer's Exhibit 3, and agreed that his signature was on the form, dated October 24, 2003. Claimant agreed that he testified in his deposition that he read the form before he signed it. He was asked about a question which stated "Was incident reported to the Safety Department ASAP by phone?" and the answer, "Reported to manager as off-duty injury—helping brothers move." RX 3. Claimant testified that the answer was not on the form when he signed it, and he and Mr. Blakeman did not discuss it. Claimant believed the statement must have been added afterwards, because he only recalled "Pulling 20-inch slips, pulling motion" being present on the form. Tr. 40. Claimant testified that everything else on the form was accurate. Tr. 41.

Claimant was asked about a note in the records from the Physical Therapy Center which reflect that Claimant indicated his pain had become worse after he had worked out with his brothers. Claimant said he does not "work out," and said that the Physical Therapy Center also said he had been in a car accident, which he had not. Tr. 42; CX 8, p. 2.

Claimant recalled reviewing the results of his MRI with Dr. Haydel on October 24, 2003. Claimant agreed that it was the same day he completed the accident report, but said that he had spoken with Mr. Every earlier, who was supposed to contact Claimant but never did. Tr. 44. Claimant said he had "not really" tried to perform any other work. He recalled that Dr. Haydel released him to light duty on October 30, 2003. TR. 45; CX 2, p. 39. He said he spoke to Mr. Blakeman about light duty who said he would look into it, but no one contacted him about returning to work. Tr. 46. On redirect, Claimant explained that he did not see a need to report his injury to the company man since he had reported it to Mr. Every.

Testimony of Brooks Blakeman

Mr. Blakeman is the Manager of the Eastern District for Employer. He works out of the Houma, Louisiana office, as did Claimant. Mr. Blakeman said Claimant was on one of the "casing crews" which typically contained a supervisor, a stabber, or man working up in the derrick, and a couple of men working on the rig floor. Mr. Blakeman recalled that Claimant was on a crew with Mr. Scott, Mr. Every, and Mr. Dupre (Claimant's brother). Tr. 49. He said that crew had worked together numerous times before. Tr. 50.

Mr. Blakeman testified that as the manager of the district office, he completes accident reports. He explained that if there is an incident on a drilling rig, it is reported to the toolpusher who is responsible for the rig, and he in conjunction with the company man, does a report on the rig. Mr. Blakeman said an accident involving Claimant was never reported to him by the toolpusher of the rig, though he said Claimant came to his office and completed accident report. Tr. 50.

Mr. Blakeman identified the document located at Employer's Exhibit 3 as the accident report dated October 24, 2003, containing his signature. EX 3; Tr. 51. He explained that most of the information on the form comes from the employee, though some of the information, such as years of experience, who else was on the job, and what time the crew left, Mr. Blakeman has in his office. He said he sat down with Claimant and completed the form, and testified that all of the information on the form was correct based on the information Claimant supplied to him. Tr. 52.

Mr. Blakeman identified a document located at Employer's Exhibit 2 as a "crew ticket," which is a document used for billing and payroll. It is completed by the supervisor and signed off by the customer. He agreed that the form indicates when a crew goes out and returns, and said the form found at EX 2 indicated that the crew went out on the night of September 12 and returned the morning of September 16, 2003.

Mr. Blakeman said he first became aware that Claimant was complaining of some type of injury was approximately September 18, 2003, when he received a telephone call from Claimant. Tr. 53. He said Claimant told him he "needed to get off the board," which is like a job roster, for a couple of days. Mr. Blakeman asked why, and he said Claimant responded that he had helped his brothers and had some tightness in his back, adding that he thought it would work itself out in a couple of days. Mr. Blakeman said he told Claimant to keep him apprised of the situation. He recalled that Claimant did not indicate what he was helping his brothers do, but Mr. Blakeman knew that their family owned some property with heavy equipment on it where the brothers frequently worked. Tr. 53-54.

Mr. Blakeman testified that Claimant did not tell him that he had hurt himself on the job, nor did he request that Employer send him for medical treatment of any kind. Tr. 54. He recalled that three or four days later, Claimant contacted him again and said his family physician had recommended physical

therapy because of a suspected strain. Mr. Blakeman said Claimant again did not indicate he had suffered an on-the-job injury or request medical treatment. Tr. 54.

Mr. Blakeman said Claimant was a very good worker. He said Claimant never explained to him why he took so long to report the accident. Mr. Blakeman said in early too mid-October, he received a call from the Lafayette office indicating that Claimant was contending his injury was work-related and some paperwork needed to be completed. Tr. 55. Mr. Blakeman denied having any conversations with Mr. Every about any accident or incident on the rig where Claimant may have been injured, and explained that Mr. Every, as a supervisor, cannot complete an accident report; it must be generated by Mr. Blakeman. He said that Mr. Every, as a toolpusher, has a duty to report accidents to him, and in the five years Mr. Every has held the position, there had not been a problem of him not reporting an accident, noting that Mr. Every is "an excellent pusher." Mr. Blakeman had never received reports from members of Mr. Every's crew indicating that they wanted to report an accident but Mr. Every "blew them off." Tr. 56.

Mr. Blakeman denied receiving numerous telephone messages from Claimant. He explained that the office operates on a twenty-four hour schedule, so there is always someone present and they know how to reach Mr. Blakeman. Tr. 56-57. Mr. Blakeman agreed that Claimant spoke with him regarding light duty employment. Mr. Blakeman told Claimant he would have to have his physician indicate exactly what he could and could not do, and then Employer would try to work with Claimant in finding employment for him. He said that Employer offers light duty employment and had one employee performing light duty at the time of the hearing. Mr. Blakeman said that Claimant never returned with specific limitations from his physician. He said if Claimant had done so, Employer would have attempted to work something out for him. Tr. 57.

On cross-examination, Mr. Blakeman said he was who actually filled in the information on the accident report. He said he did so by hand. Mr. Blakeman was shown Employer's Exhibit 3 and acknowledged that it was typewritten, explaining that he handwrites the report first and one of his employees types it afterward. He said the typewritten report was signed on October 23, 3004. Tr. 59. Mr. Blakeman acknowledged that the report indicated that Claimant's accident was not reported to the safety department because he initially reported the injury as occurring off-the-job. He said that Claimant did so when he reported the injury to Mr. Blakeman on September 18, 2003. Mr. Blakeman said that when Claimant completed the report with him, that was not what he indicated as to how he hurt his back; rather,

he said he was pulling slips on a 20-inch spider. Mr. Blakeman said that is what he indicated as how the accident occurred. He explained that he had to provide some reason as to why Claimant's injury was not immediately reported to the safety department, so he recorded that Claimant had originally reported that the injury occurred off the job. Tr. 61.

On redirect, Mr. Blakeman explained that he did not "make up" the portion of the report indicating that Claimant reported the injury as occurring off the job; the information came from the conversation he had with Claimant on September 18, 2003.

Deposition of Russell Every

Mr. Every was deposed on April 15, 2005. Mr. Every testified that he had worked for Employer for over thirteen years and was currently a crew pusher, a position he held since 1999. Mr. Every described his job as being the supervisor of a casing crew. He said he had a crew that he usually worked with; Claimant, Clark Dupre and Raymond Scott. EX 9, p. 6.

When asked to recall September 15, 2003, Mr. Every said that the crew was on the job, which he thought was a BP job. He recalled Claimant telling him that sometime after the job, his back had stiffened up or was hurting him. Mr. Every did not ask any questions of Claimant, though he said maybe he should have asked Claimant if he wanted to complete an accident report. EX 9, p. 7.

Mr. Every said he and Claimant had been "sitting around," playing cards, and Claimant said his back hurt. Mr. Every said that it was his responsibility to complete an accident report, but at the time, he did not think it "was a big deal," rather, he thought Claimant was mentioning his back pain "in general conversation." Mr. Every described Claimant as a good, hard worker, with whom he had no problems. EX 9, p. 9. He said in the time he had worked with Claimant prior to September 2003, Claimant had never complained of back pain. EX 9, p. 10.

On cross-examination, Mr. Every said he could not recall Claimant telling him that he sustained an injury while he was working. EX 9, p. 11. Mr. Every said he and Claimant worked in close proximity to each other and he did not witness any time while they were working where Claimant grabbed his back or fall or trip. EX 9, p. 12. He did not witness Claimant sustain any direct blows. Mr. Every described the procedure for reporting accidents, stating that Claimant would probably tell him, and he would tell the driller or the toolpusher. He explained that

the injured worker can tell the company man, or can pass it on to the medic. He said that if it is reported to him that one of his crew is injured, he is supposed to tell the next person in the chain of command and find out what sort of procedure should be followed. EX 9, p. 13.

Deposition of Clark Dupre

Mr. Dupre was deposed on April 15, 2005. He testified that he has worked for Employer for eight and one-half years; he currently works as a stabber, a position he has held for six years. CX 10, p. 6. Mr. Dupre is Claimant's brother. He recalled the day Claimant was injured, and said they were screwing and driving casing the day of the injury. He knew Claimant was hurt because he was complaining about his back after the job was over. CX 10, p. 7. Mr. Dupre said after they finished the job, the crew was "sitting around, playing cards," waiting for a boat.

Mr. Dupre explained that casing slips fit around the casing, and have four or five handles on them which are used to pick the slips up. He estimated that a casing slip weighs about one hundred and fifty pounds, but explained that four or five people pick them up. CX 10, p. 8. He said there were approximately twenty-five joints on that shift, which meant the casing slip had to be picked up twenty-five times. CX 10, p. 9.

Mr. Dupre said that Mr. Every was in charge of the crew, which consisted of Mr. Every, Mr. Dupre, Mr. Scott, and Claimant. CX 10, p. 10. He guessed the job, which was in the Gulf of Mexico, lasted about two days. He testified that about twenty or thirty minutes after the crew stopped working, Claimant complained of back pain. CX 10, p. 11. He recalled Claimant saying he could hardly sit down because his back hurt. Mr. Dupre said that he and Mr. Every were present when Claimant complained of back pain. He said Mr. Every did not say anything about Claimant's complaint. Mr. Dupre helped Claimant carry his toolbox, which weighted approximately thirty pounds, when they boarded the boat to leave. CX 10, p. 12. He said Claimant did not ask him to carry the toolbox. CX 10, p. 13.

Mr. Dupre said that prior to this incident, Claimant had never mentioned that his back hurt. He did not recall Claimant having any previous back problems. CX 10, p. 13. Mr. Dupre believed that it was probably the pusher's responsibility to complete an accident report. He said Mr. Every "probably should have told somebody," but explained that they all thought it was a pulled muscle and "nothing serious." CX 10, p. 14.

To Mr. Dupre's knowledge, no one complained about Claimant's work, and he said Claimant was a good worker when they worked together. CX 10, p. 16. Mr. Dupre has spent time with Claimant since the incident and said that every time he goes to Claimant's house, Claimant is lying down or sleeping. Mr. Dupre said Claimant has not worked anywhere since September 2003. CX 10, p. 17.

On cross-examination, Mr. Dupre said he did not generally work with Claimant; they worked together occasionally. He said Claimant was a tong operator, and when he was running the tongs, Mr. Dupre was up in the derrick, which he estimated to be thirty or forty feet from where Claimant works. CX 10, pp. 19-20. Mr. Dupre clarified that every time a casing slip had to be picked up, all four members of the crew have to participate. CX 10, p. 21. He said during the job on September 15, 2003, all four of the crew members were on the floor together; Mr. Dupre was not up in the derrick. He explained that the job was a "screw and drive," so there was no derrick. CX 10, p. 22.

Mr. Dupre said the job was completed and the crew had "rigged down," which he estimated took about an hour and a half. The crew put up the equipment, showered, changed clothes and were waiting for the boat when Claimant first said something about his back hurting. CX 10, pp. 23-24. Mr. Dupre said Claimant did not say anything about his back while the crew was working, or when they were rigging down. He did not ask Claimant about his back when Claimant mentioned it was sore. Mr. Dupre said Claimant did not say anything like "it happened when we were picking up the slips." CX 10, p. 26. He did not know if Claimant said anything of that nature to Mr. Scott or Mr. Early. The crew rode the boat back to Fourchon. Then they rode in a company truck; Mr. Dupre said Mr. Early dropped him off first and Claimant off last. On the ride home, Claimant did not say anything to Mr. Dupre about how he hurt his back or what happened. CX 10, p. 27.

Mr. Dupre was aware that an accident report was eventually completed at Employer's office. He agreed that if a worker gets hurt on a rig, the injury is supposed to be reported to the company man on the platform; he did not think that was done in Claimant's case. CX 10, p. 28.

On redirect, Mr. Dupre explained that sometimes injuries are not reported to the company man because it is placed on a worker's record. Mr. Dupre said he broke his finger and never reported it, because he did not want a lost time accident on his record and did not want a safety bonus taken away from him. CX 10, p. 30.

On recross, Mr. Dupre agreed that the company rule is that injuries are supposed to be reported to the company man; but he said sometimes they are not reported because they are not thought to be "a big deal." CX 10, p. 32.

Deposition of Raymond Scott

Mr. Scott was deposed on April 15, 2005. Mr. Scott has worked for Employer for nearly seventeen years as a floorhand. CX 11, p. 6. Mr. Scott estimated that in total, he worked with Claimant for about seven years, both in the shop and offshore. CX 11, p. 7. He said in the time he worked with Claimant, Claimant was a good worker and never reported any back problems prior to September 2003.

Mr. Scott recalled that in September 2003, he was at the end of an offshore job. He was in bed and Claimant was sitting in a chair when he complained that his back hurt. Claimant did not tell Mr. Scott how he hurt his back. CX 11, p. 8. Claimant did not give any indication how long his back had been hurting him. CX 11, p. 8.

Mr. Scott could not recall how the crew came in from offshore. He did remember that his crew consisted of himself, Claimant, Mr. Dupre and Mr. Every; Mr. Every was the supervisor. CX 11, p. 9. He was not aware of any accident report being completed regarding Claimant's back pain. He believed that Claimant stopped working for Employer shortly after he complained of back pain, and that job was the last time Mr. Scott worked with Claimant. CX 11, p. 9.

On cross-examination, Mr. Scott reiterated that he was lying in bed and Claimant was sitting in a chair when Claimant complained of back pain. He agreed that the crew had finished the job and had rigged down and was waiting for the boat or whatever was taking them back to shore. Prior to the time Claimant complained of back pain, Mr. Scott had not seen any accident or anything that would indicate that Claimant been involved in an accident. Claimant did not tell Mr. Scott that he suffered any type of accident/injury on the rig. CX 11, p. 10.

Medical Evidence

Family Doctor Clinic/ Drs. Harris and Robichaux

Claimant attended an appointment at the clinic with Dr. Robichaux on September 20, 2003, complaining of lower back pain. The words "heavy work"

are legible on the notation of the visit. CX 3, p. 6.[4] Claimant returned on September 22, where he reported that his back was still sore. CX 3, p. 6. On September 30, the note indicates that Claimant was not better, and there was no history of specific trauma. Also contained in the record are notations of Claimant's previous visits to his family physician where he was seen for ailments such as shoulder pain, a rash, and a chest cold. CX 3, p. 4. Dr. Harris completed a form on October 6, 2003 wherein he listed Claimant's diagnosis as lumbar strain, and indicated that Claimant's disability was not caused by an accident. He restricted Claimant from bending and lifting more than twenty pounds, and assumed he could return to work on October 13, 2003. CX 7, p. 3.

Houma Orthopedic Clinic/Dr. Larry Haydel

Claimant saw Dr. Haydel on October 13, 2003 where he presented with complaints of low back pain. Claimant completed an intake form wherein he indicated the date of his injury/accident as September 15, 2003, and said the injury/accident happened while working. CX 2, p. 12. The note reflects that Claimant stated this happened "after doing some heavy pulling at work on September 15, 2003." CX 1, p. 1. Dr. Haydel reviewed x-rays which revealed some degenerative disc disease. His impression was lumbar strain with sciatic symptoms. He ordered an MRI scan of the lumbar spine. CX 1. p. 1. In an Attending Physician's Statement, issued on October 21, 2003, he kept Claimant off work for an "undetermined" time. CX 1, p. 2.

Claimant returned to Dr. Haydel's office on October 24, 2003 with continued complaints of back pain with radiation to the right leg. Dr. Haydel reviewed Claimant's MRI scan which showed a five millimeter right paracentral disc protrusion at L5-S1. CX 2, p. 1. Dr. Haydel noted that he discussed options with Claimant. He referred Claimant to physical therapy, prescribed Vioxx and Flexeril, and discussed the use of epidural injections. CX 1, p. 1. On October 30, 2003, Dr. Haydel released Claimant to return to work with restrictions of no lifting over twenty pounds and no repetitive lifting. He said that if light duty work was not available, Claimant was to remain off work. CX 1, p. 4.

Claimant next saw Dr. Haydel on December 9, 2003, where he presented with continued symptoms of pain in the back and radiation into the right leg. Claimant's medications were refilled and Dr. Haydel noted Claimant would continue with physical therapy. CX 1, p. 7. Claimant returned on January 13, 2004 with the same symptoms of pain and radiation into his right leg to the

[4] The notes from Family Doctor Clinic are handwritten and illegible in many parts.

posterior calf and sole of his foot. Dr. Haydel's impression remained right L5-S1 disc herniation. Dr. Haydel explained to Claimant that he may have to undergo a lumbar laminectomy if his pain did not improve. CX 1, p. 7.

On February 17, 2004, Dr. Haydel noted that Claimant was being followed for a lumbar disc herniation "after doing some heavy pulling at work" in September 2003. He indicated that Claimant continued to have pain despite conservative management, and his plan was for Claimant to undergo a laminectomy/discectomy. CX 6, p. 2. On April 5, 2004, Dr. Haydel noted Claimant had continued complaints of pain, but was awaiting approval for surgery. On May 11, June 29, August 16, October 4, and November 15 he continued to wait for approval. CX 6, pp. 1-2. Claimant was treated with Vioxx, Flexeril, and Vicodin. The last record of Claimant seeing Dr. Haydel is March 1, 2005, where he presented with continuing complaints of pain and decreased motion in his back secondary to pain. He was still waiting for approval for surgery, and was treated with Lodine, Flexeril, and Vicodin. CX 6, p. 4.

Physical Therapy Center

Dr. Harris of the Family Doctor Clinic initially referred Claimant for physical therapy on September 30, 2003. CX 3, p. 6; CX 4, p. 1. The referral indicates Claimant's diagnosis as degenerative disc at L4-L5. CX 4, p. 1. However, another referral was completed on October 24, 2003 which lists as diagnosis "lumbar spine." The referral was for physical therapy three times per week for four weeks. The signature of the physician who completed the form is illegible. CX 4, p. 2. The patient information form from the Physical Therapy Center indicates the date of onset of Claimant's injury as "September 16, 17" and the question asking whether the injury was due to an accident has a question mark next to it. CX 4, p. 3.

The initial evaluation at Physical Therapy Center was conducted on October 6, 2003. The evaluation indicates that the onset of Claimant's symptoms "started insidiously while he was at work reporting problems with sitting." The report also reflects that Claimant's symptoms "worsened after working out with his brothers at home, reporting increased pain the next day." CX 4, p. 4. A note to Dr. Harris from physical therapist Eddie Himel, dated October 14, 2003, indicates that Claimant attended four visits and had no new complaints but was experiencing the same overall symptoms. Mr. Himel noted that Claimant had seen Dr. Haydel on his own and was going to continue physical therapy pursuant to Dr. Haydel's suggestion. CX 4, p. 56.

Other Evidence

Claimant's Exhibit 5 consists of copies of medical bills. These bills include $20.00 from Falcon Law Firm; $721.20 from the Physical Therapy Center; $205.39 from the Family Doctor Clinic; and $2,045 from Houma Orthopedic and Open MRI of Louisiana.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

The Parties' Contentions

Claimant argues that he invokes the 20(a) presumption which operates to link his injury with his employment, and asserts that Employer/Carrier cannot rebut the presumption to show that Claimant's injury was not caused or aggravated by his work. Further, Claimant contends that Mr. Every, his supervisor on the day in question, was aware that Claimant had suffered an injury or was experiencing pain in his back, which satisfies the requirement that Claimant notify Employer of the injury. Claimant asserts that he is entitled to temporary total disability benefits and medical benefits.

Employer/Carrier, on the other hand, contends that the evidence establishes that no one witnessed an accident on the rig or heard Claimant complain of an accident on the rig. Employer/Carrier claims that Claimant has only his own testimony to establish his claim, because the testimony of his co-workers and the medical evidence do not speak to causation of his alleged injury. Employer/Carrier

asserts that Claimant cannot invoke the Section 20(a) presumption with the evidence of record, and in the case that he does, Employer/Carrier contends that it has rebutted the Section 20(a) presumption and argues that Claimant's claim should be dismissed in its entirety.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary. 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, I find that Claimant has invoked the Section 20(a) presumption. Claimant has established that he suffered a harm, his back pain; and that working conditions existed which could have caused, aggravated, or accelerated his back pain. Claimant testified that as a tong operator, he was required to perform heavy lifting. In addition, Mr. Dupre explained that casing slips weigh approximately one hundred and fifty pounds, and the crew was required to left them multiple times. Further, the medical evidence establishes that Claimant suffered from back pain which was documented by the physicians at Family Doctor Clinic as well as by Dr. Haydel; Dr. Haydel's notes indicate that Claimant experienced pain after doing some heavy pulling at work. Dr. Claimant's co-workers all testified that he told them he was experiencing back pain while they were still on the job. Accordingly, Claimant has established a *prima facie* case and invokes the presumption which operates to link his injury with his employment, and the burden

shifts to Employer/Carrier to produce substantial evidence that Claimant's condition is not related to his work.

Employer/Carrier assert that Claimant did not suffer an on-the-job injury. I do not find that the evidence submitted by Employer amounts to "substantial evidence to the contrary." Employer relies on the initial note completed by Dr. Harris on October 6, 2003, where in response to the question "Was disability caused by an accident," Dr. Harris checked a box marked "No." EX 1. Further, Employer points to the accident report where Mr. Blakeman indicated that Claimant initially reported his injury as not being work-related. Mr. Blakeman testified that Claimant called him to inform him that he needed time off because he had "helped his brothers" and had experienced tightness in his back. Tr. 53.

Though Employer's reasoning is plausible, I am not persuaded that substantial evidence supports its position. Dr. Harris did not indicate that Claimant's lumbar strain was not caused by his employment; he said it was not caused by an accident. Further, the only indication that Claimant injured his back in performing another activity comes from Mr. Blakeman, who could not recall what it was that Claimant was helping his brothers do when he worsened his back condition. In sum, I do not find that the evidence introduced by Employer/Carrier is substantial enough to sever the causal connection between Claimant's injury and his work. Therefore, the Section 20(a) presumption has not been rebutted.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature. In this case, none of Claimant's physicians have spoken to the issue of MMI; Dr. Haydel's notes for months have indicated that Claimant is awaiting approval for surgery. *See McCaskie v. Aalborg Ciserv Norfolk, Inc.*, 34 BRBS 9, 12 (2000) (noting that where surgery is anticipated, maximum medical improvement has not been reached) (citing *Kuhn v. Associated Press*, 16 BRBS 46 (1983)). Therefore, any compensation awarded will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to

return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the instant case, Dr. Harris at Family Doctor Clinic released Claimant to work on October 13, 2003, and restricted Claimant against bending and lifting more than twenty pounds. Dr. Haydel subsequently kept Claimant off work effective October 13 until October 30, where he restricted Claimant from lifting over twenty pounds and ordered no repetitive lifting. Claimant testified that he told Mr. Blakeman he was released to light duty, and Mr. Blakeman's testimony supports Claimant's statement. However, Claimant said he was instructed to obtain specific physical limitations from his physician, and after he did so, Mr. Blakeman did not contact him. Mr. Blakeman, on the other hand, said that Claimant never followed up with him regarding physical restrictions. The letter from Dr. Haydel dated October 30, 2003, obviously contains Claimant's restrictions. Whether or not Employer received this letter is unknown, but in any event, an offer of a specific light duty job was never made to Claimant, and Employer has not identified suitable alternative employment. Therefore, Claimant, who has made out a *prima facie* case of total disability in as much as he cannot return to his former employment, remains totally temporarily disabled.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS

255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

Claimant received treatment from Drs. Robichaux and Harris at Family Doctor Clinic, and with Dr. Haydel. He also received physical therapy recommended by both Drs. Harris and Haydel. Mr. Blakeman, Employer's manager, signed an Attending Physician's Statement issued by Dr. Haydel on October 30, 2003. CX 1, p. 2. Dr. Haydel exclusively treated Claimant for his back problems after that time; and I find that this amounted to a change of physicians, for an employer shall consent to change of physicians where the employee's initial free chose was not a specialist whose services are necessary for and appropriate to proper care and treatment. *See Slattery Assoc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (D.C. Cir. 1984). Employer/Carrier is liable for Claimant's reasonable and necessary medical treatment incurred as a result of his back injury, including the past and future treatment provided by Dr. Haydel.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer controverted on October 29, 2003. Therefore, no Section 14(e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from September 20, 2003, the first day he missed work due to his injury, and continuing, based on an average weekly wage of $900.00;

(2) Employer/Carrier shall pay for all reasonable and necessary medical expenses incurred as a result of Claimant's back injury of September 15, 2003;

(3) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(4) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(5) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 11th day of August, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd